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The Criminal Law Amendment Act 1985: Implications for International Criminal Law

SHARON A. WILLIAMS*

THE NEW CRIMINAL LAW AMENDMENT ACT 1985¹ was proclaimed into force on December 4, 1985. It has far-reaching goals. It seeks to take Canada's criminal justice system into the realm of contemporary criminal activities, and includes a wide range of crimes from domestic offences such as impaired driving and boating and computer crime to international concerns such as hostage-taking and offences against nuclear material.

The Act is mammoth, comprising 212 sections and five annexes. The aim of this short analysis is to discuss only the main provisions that concern international criminal law, notably the offence of hostage-taking and offences against nuclear material.²

INTERNATIONAL AND TRANSNATIONAL CRIMINAL LAW DISTINGUISHED

As a preliminary step it is important to distinguish between international and transnational criminal law.

International criminal law, strictly speaking, includes all criminal offences that have been proscribed by the international community through customary and conventional international law. For example, in the last twenty-two years we have witnessed the attempts made

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¹ S.C., 1985, c. 19. Note especially ss. 5 and 41.

² There are other amendments in the 1985 Act but they mainly clarify existing sections. For example, see ss. 6(1.2), 387.1, and 388 offences against internationally protected persons; 58(2) re false statements in relation to passports and ss. 423(1)(a), 423(3-6) re conspiracy.

by the international community, under the auspices of the United Nations and its specialized agencies, to curtail terrorist activities. Hijackings,³ other attacks upon civil aviation,⁴ attacks on diplomats and other internationally protected persons,⁵ hostage-taking,⁶ and offences against nuclear material⁷ are the most prominent international offences of this generation. Prior generations have borne the brunt of two world wars and countless other armed conflicts of a national or international character and upon those they put their stigmatization, branding as international criminals and the enemies of mankind the perpetrators of crimes against peace, war crimes, and crimes against humanity.

Condemnation and control of offences against the universal public policy may be in the form of a multilateral treaty setting down obligations upon states parties to utilize wide bases of jurisdiction over the offence and to extradite or prosecute (*aut dedere, aut judicare*) the alleged offenders. Upon ratification, states would assume these obligations and would be required to act in good faith.

Transnational criminal law is completely different, although it is sometimes fallaciously termed "international." The offences are ordinary common law crimes and the only international connotation is that there are one or more foreign elements. On account of the fact that two or more states are involved in some way, there may be international ramifications even though the offences are not proscribed by customary or conventional international law. The offences, common crimes in nature, simply traverse international boundaries. The international legal rules help to identify the bases of jurisdiction over the offence and the method of acquisition of jurisdiction over the person. However, once seized of a case, the courts of the forum will apply domestic criminal law if in fact they have

³ See the Tokyo Convention on Offences and Certain Other Acts on Aircraft, 1963, 1970, Can. T.S. No. 5 and the Hague Convention for the Suppression of Unlawful Seizure of Aircraft, 1970, 1972, Can. T.S. No. 23.

⁴ See the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, 1971, 1973, Can. T.S. No. 6.

⁵ See the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons including diplomatic agents (1974) 13 Int'l. Leg. Mat. 41.

⁶ The International Convention Against the Taking of Hostages, 1979, reprinted in (1979) 18 Int'l. Leg. Mat. 1456.

⁷ The Convention on the Physical Protection of Nuclear Material, 1979, reprinted in (1979) 18 Int'l. Leg. Mat. 1419, 1422-31.

jurisdiction over the person and a jurisdictional basis over the offence in domestic criminal law.

INCORPORATION INTO CANADIAN CRIMINAL LAW

In Canada, it is necessary for offences to be incorporated into the Criminal Code or other relevant penal legislation, as section 8 of the Code provides that "no person shall be convicted of . . . an offence at common law." It follows that international criminal offences that are proscribed by the international community through the establishment of rules of customary international law or international conventions are not part of Canadian criminal law until implementation by way of amendment to the Criminal Code or other relevant statute has taken place.

When Canada signs an international convention dealing with international crimes, the usual practice is to delay ratification until the amending legislation has been enacted. This ensures compliance domestically before the international obligations are assumed. Naturally, many criminal offences may have a domestic equivalent. For example, a terrorist hostage-taking and intentional killing could be looked at as kidnapping⁸ and murder.⁹ If the offences had taken place in Canada there would be no question concerning our court's jurisdiction over them. However, today's criminals, especially those of the terrorist persuasion, do not tend to commit an offence in a state and remain in that state. They seek refuge abroad.

In order to enable Canada to participate effectively in the eradication of international criminal offences such as terrorism, the Criminal Code has had to be amended to allow for jurisdiction over the offence in a wide variety of circumstances. This is one of the key features and obligations of all anti-terrorist conventions. The other is the extradite or prosecute provision. Should a state for some reason be unable or unwilling to extradite a fugitive offender present in its territory and charged with such heinous offences in other states, it must as a back-up itself have the power to prosecute. Without this provision the fugitive would go scot-free.

All the conventions therefore provide that states parties shall establish the stated offences and jurisdiction over them in their domestic legislation.¹⁰ The bases of jurisdiction in all the conventions

⁸ See s. 247 Criminal Code.

⁹ See ss. 212 and 247, Criminal Code.

¹⁰ The language concerning penalties and submission to authorities for purposes of prosecution differs between the conventions.

can be summed up as follows: (a) crimes committed within the territory, including ships or aircraft registered in the state; (b) the active nationality principle, which provides for jurisdiction based on the alleged offender having the nationality of the state assuming jurisdiction; (c) the passive personality principle, whereby the victim's state of nationality takes jurisdiction; and (d) the presence of the alleged offender after the commission of the offence abroad in the state seeking to prosecute being sufficient connection.¹¹

Canada, in general, bases its jurisdiction over the offence on the territorial principle of jurisdiction. Section 5(2) of the Criminal Code provides in this context that no one shall be prosecuted in Canada for an offence committed outside of Canada, unless it is expressly provided for in the Code itself or other Act of Parliament. As a result Canada has had to make such exceptions to the basic territorial approach by amending the Criminal Code to incorporate the offences and these wider bases of jurisdiction, including the presence of the alleged offender within Canada.

THE CONVENTION APPROACH

Modern terrorist tactics show no respect for international borders and state sovereignty. Although often it is the military, heads of state, and other civil servants who are the preferred targets of attack, many innocent civilians find themselves at risk or, worse, maimed, killed as mere bystanders, or taken hostage as demonstrated in the hijacking of the Egypt Air aircraft to Malta and in the taking of the cruise ship *Achille Lauro* in 1985. Platitudes such as "one person's terrorist is another's liberator" are false and misleading. The terrorist causes terror to the general populace. To gain publicity for his or her cause, to invoke fear of the repercussions if demands short- and long-term are not met, the terrorist wreaks havoc in diverse countries regardless of the consequences to life and limb.

A progression can be seen in the types of terrorist acts that have taken place in the last twenty years or so. Hijacking was the fashion in the 1960's and 1970's, resulting in adoption by member states of the International Civil Aviation Organization of the Tokyo,¹²

¹¹ This is comparable to some extent to the concept of universal jurisdiction over enemies of mankind, enabling any state managing to get control over the person the right to prosecute.

¹² *Supra* note 3.

Hague,¹³ and Montreal¹⁴ Conventions. Attacks on diplomats and other internationally protected persons and hostage-taking have become prime areas of concern, resulting in adoption by the United Nations of the 1974 New York Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons¹⁵ and the 1979 Hostage-Taking Convention.¹⁶ The fear that has become apparent today is that there are other extremely sensitive areas susceptible to the terrorist whim. Nuclear installations, nuclear material, and explosive devices could if seized be used to hold not only individuals but governments hostage by the threat of unreasoned use. In a similar vein the terrorist threat could centre on other types of installation crucial to the population of a country. Contaminants could be fed into a major city's water supply. Hydro facilities could be put out of order and force the chaos of a black-out to occur. Demands could be made and a huge segment of the population terrorized, particularly if the media aids the terrorist cause by indiscriminate reporting.

This is not the time to dwell upon the internationalization of terrorism, but it should be emphasized that many terrorist organizations give each other assistance and certain states act as safe havens or give actual aid and training. In order to eradicate terrorism — or if this does not occur to prosecute the offenders — it is necessary to have wholesale application of the multilateral treaties that deal with the offences. It is useless if only the victim states are obligated. It is also essential that the most elastic bases of jurisdiction are used to give as many states as possible the grounds upon which to base a prosecution.

HOSTAGE-TAKING AND OFFENCES AGAINST NUCLEAR MATERIAL

The two most recent international attempts at combatting terrorist offences have been the Hostage-Taking Convention of 1979¹⁷ and the Convention on the Physical Protection of Nuclear Material of 1980.¹⁸ They respond to the currently perceived threats to international society. It will be seen in the pages that follow that the two

¹³ *Ibid.*

¹⁴ *Supra* note 4.

¹⁵ *Supra* note 5.

¹⁶ *Supra* note 6.

¹⁷ *Ibid.*

¹⁸ *Supra* note 7.

conventions to an extent adopt a similar approach based on earlier models already mentioned. From a Canadian perspective, their implementation into domestic criminal law has raised a few controversies. As will be seen, four questions raised are: (1) does the 1985 act in its bases of jurisdiction go beyond the conventions and seek a basis of prosecution not validated by conventional or customary international law; (2) do the provisions creating the offence of conspiracy violate international law; (3) does the drafting of the sections lack clarity; and (4) could an accused prosecuted under the new sections argue that they are in breach of sections 7 and 11(g) of the Canadian Charter of Rights and Freedoms?

Hostage-Taking

The aim of the Hostage-Taking Convention is to deal with hostage-taking of all individuals and not just the internationally protected persons covered by the earlier Convention. The Convention defines the offence in Article 1 as follows:

Any person who seizes or detains and threatens to kill, to injure or to continue to detain another person (hereinafter referred to as the "hostage") in order to compel a third party, namely, a State, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the offence of taking of hostages ("hostage taking") within the meaning of this Convention.

Attempts and participation as an accomplice are covered.¹⁹ States parties are obliged to make the listed types of offences punishable by appropriate penalties which recognize the grave nature of the crimes.²⁰ Because a state in which a hostage-taking incident has occurred is in a delicate position vis-à-vis other concerned states, Article 3 states:

1. The State Party in the territory of which the hostage is held by the offender shall take all measures it considers appropriate to ease the situation of the hostage, in particular, to secure his release and, after his release to facilitate, when relevant, his departure.

2. If any object which the offender has obtained as a result of the taking of hostages comes into the custody of a State Party, that State Party shall return it as soon as possible to the hostage or the third party

¹⁹ *Supra* note 6, Art. 1(2).

²⁰ *Ibid.*, Art. 2.

referred to in article 1, as the case may be, or to the appropriate authorities thereof.

As with hijacking and attacks on internationally protected persons, international co-operation is perhaps the only method to suppress and deter such occurrences. Illegal activities of individuals, groups of individuals, or organizations that encourage, instigate, organize, or participate in hostage-taking must be prohibited.²¹ Co-operation needs to be co-ordinated to be effective.²²

Article 5 sets out the usual basis of jurisdiction over the offence. It states:

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over any of the offences set forth in article 1 which are committed:

- (a) in its territory or on board a ship or aircraft registered in that state;
- (b) by any of its nationals or, if that State considers it appropriate, by those stateless persons who have their habitual residence in its territory;
- (c) in order to compel that State to do or abstain from doing any act; or
- (d) with respect to a hostage who is a national of that State, if that State considers it appropriate.

2. Each State Party shall likewise take measures as may be necessary to establish its jurisdiction over the offences set forth in article 1 in cases where the alleged offender is present in its territory and it does not extradite him to any of the States mentioned in paragraph 1 of this article.

3. This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law.

Besides the usual bases of jurisdiction in this type of convention based on territory, registration of aircraft and shipping, passive and active nationality, and presence within the territory, the Hostage-Taking Convention has two novel features. First, it provides that a state may assume jurisdiction over habitual residents of its territory who are stateless and second, that it may do so where it is made the target of a hostage-taking offence. Noteworthy also is that the Convention does not exclude any criminal jurisdiction exercised in accordance with international law.

²¹ *Ibid.*, Art. 4(a).

²² *Ibid.*, Art. 4(b).

Article 8 provides for the extradite or prosecute concept. It is couched in stronger terms than the Internationally Protected Persons Convention,²³ in that the decision to prosecute must be done in the same manner as for grave ordinary domestic offences.

Article 9 has a type of non-refoulement obligation which aroused some opposition.²⁴ Article 14 recognizes that nothing in the Convention shall justify violation of the territorial integrity or political independence of a state in contravention of the United Nations Charter. This is seen as an "Anti-Entebbe" clause. This article and Article 12, both of which deal with situations concerning national liberation movements, are compromises whose meaning, in the mind of this writer, is open to debate. These articles illustrate the problems of making an agreement at the international level. The lowest common denominator therefore may be sufficiently abstract or ambiguous to be agreed upon.

The Convention has not yet come into force. Canada signed it on February 19, 1980.²⁵ Before ratification, it was necessary to amend the Criminal Code to provide for the offence and jurisdiction over it. The 1985 Criminal Law Amendment Act²⁶ does just that. The new sections 247(2) and 247.1 of the Code provided by this 1985 Act establish the new offence of hostage-taking and provide for punishment. Section 6(1.3) of the Code now stipulates that Canada will utilize expanded extraterritorial jurisdiction over the designated offence. It provides for the usual exception to section 5(2) by stating that:

Notwithstanding anything in this Act or any other Act, every one who, outside Canada, commits an act or omission that if committed in Canada would be an offence against section 247.1 shall be deemed to commit that act or omission in Canada if

- (a) the act or omission is committed on a ship that is registered or licensed, or for which an identification number has been issued, pursuant to any Act of Parliament;
- (b) the act or omission is committed on an aircraft
 - (i) registered in Canada under regulations made under the Aeronautics Act, or

²³ *Supra* note 5.

²⁴ See Sharon Williams and J.-G. Castel, *Canadian Criminal Law: International and Transactional Aspects*, at 208 (1981).

²⁵ P.C. 1980-345, Feb. 1, 1980.

²⁶ *Supra* note 1, s. 5.

- (ii) leased without crew and operated by a person who is qualified under regulations made under the Aeronautics Act to be registered as owner of an aircraft in Canada under such regulations;
- (c) the person who commits the act or omission
 - (i) is a Canadian citizen, or
 - (ii) is not a citizen of any state and ordinarily resides in Canada;
- (d) the act or omission is committed with intent to induce Her Majesty in right of Canada or of a province to commit or cause to be committed any act or omission;
- (e) a person taken hostage by the act or omission is a Canadian citizen; or
- (f) the person who commits the act or omission is, after the commission thereof, present in Canada.

The implementing sections give rise to some comment. Section 6(1.3) confers jurisdiction on Canadian courts not only where the act or omission occurred outside Canada on a ship or aircraft registered in Canada as is laid down in the 1979 Hostage-Taking Convention, but also in the case of ships licensed in Canada and aircraft leased to a person qualified to be registered as an owner in Canada.

Both of these provisions go beyond Article 5 of the Convention that obligates states parties to take such measures as may be necessary to establish jurisdiction over the offences of hostage-taking that are committed, among other things, in its territory or on board an aircraft or ship registered in that state. The question that arises is whether a prosecution entertained on the basis of such licence or lease contained in section 6(1.3) of the Criminal Code would violate international law. It should be noted that the same issue arises in implementation of the Protection of Nuclear Material Convention contained in section 6(1.7)(a) and (b). The Law Reform Commission of Canada²⁷ takes the position that it would violate international law, at least in cases concerning foreigners. It is argued further²⁸ that Article 5(3) of the 1979 Convention states that the Convention does not exclude any jurisdiction exercised in accordance with international law. The Commission takes the position that Article 5(3) "envisages that the internal criminal law of a state complies with international law."²⁹ This writer is of the same view. Article 5(3) logically would seem to refer to the exercise of juris-

²⁷ Working Paper No. 37, *Extraterritorial Jurisdiction* (1984), at 94-95.

²⁸ *Ibid.*

²⁹ *Ibid.*, p. 94.

diction that flows from rights granted to states under international law.

It is a provision in section 6(1.3)(b)(ii) that causes the most difficulty. Jurisdiction will be taken on the basis of the status of the lessee and operator of an aircraft. Envisage the following scenario: X qualified under Canadian law to be registered in Canada as an owner of aircraft leases and operates in France a French aircraft for use in Europe. This aircraft, crewed by French citizens and carrying only persons of different European nationalities, is commandeered by a Palestinian who takes the Europeans hostage. Canada's connection here would appear minimal. Of course, should the Canadian lessee/operator be a party to the hostage-taking he would be covered by the nationality principle in section 6(1.3)(c)(i). The passive personality principle would not be relevant unless the lessee/operator was a victim, as provided in section 6(1.3)(e). The protective principle would not be useful unless the federal government or the provinces were the target states, as contained in section 6(1.3)(d).

The conclusion that could be reached is that this extension of jurisdiction by Canada beyond that provided in the 1979 Convention and beyond any rules of customary international law would violate our current international obligations to respect the sovereignty of other states and not extend without justification our jurisdiction extraterritorially. It could be contended by any person brought to trial in Canada that these sections contravene section 7 of the Canadian Charter of Rights and Freedoms³⁰ and that as such the basis of prosecution is invalid. It could also be argued that these sections could constitute an infringement of section 11(g) of the Charter, which provides that any person charged with an offence has the right:

not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations.

The Law Reform Commission of Canada is of the view that there may be a contravention of section 11(g) in those instances where the "extraterritorial conduct is not an offence as of the time it occurs

³⁰ Constitution Act 1982, Part I, which is Schedule B of the Canada Act 1982, 1982, c. 11 (U.K.), s. 7 provides that: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

but only subsequently when the accused comes to Canada.”³¹ One author argues that:

given the reference in subsection 11(g) of the Charter and to international criminal law, the reference in section 7 to principles of fundamental justice, and the general power of the courts under section 52 to examine the validity of legislation, it may also be that, at least as far as a person's rights under criminal law are concerned the courts would strike down proposed [as it then was] section 6(1.3) (b) (ii) as contrary to international law, or construe it “strictly as applying only in accordance with international law.”³²

The only apparent argument that can be proffered is that similar provisions can be found concerning lessees in the Hague³³ and Montreal³⁴ Conventions. Can such similarly worded articles allowing jurisdiction based on the close connection between state and lessee justify the assumption that such a basis has developed since the adoption of these Conventions in 1970 and 1971 respectively into a general rule of customary international law? It is relevant to note that as of April 1984 there were 121 states parties to the Hague Convention and 119 states parties to the Montreal Convention. This writer would contend that these acceptances by the majority of states demonstrates a sufficient generality and consistency of state practice and *opinio juris* to evidence a rule of customary international law.

Also, it would seem that the suggestion made by Mr. Simpson of the Law Reform Commission of Canada overlooks the fact that section 11(g) of the Charter does stipulate that the act or omission must at the time of its commission have been an offence under Canadian law *or* international law *or* was recognized by the community of nations.³⁵ Even if the offence of hostage-taking were simply a product of treaty and not recognized in customary international law or the general principles of law, it would be sufficient if it were an offence in Canada. The word “or” is used twice in section 11(g). It is not necessary for the offence to be one under both Canadian and international systems. Of relevance too is the fact that Mr. Simpson in his article and the Law Reform Commission in

³¹ *Supra* note 27, at 95.

³² Simpson, “Hostage-Taking and Nuclear Material,” (1984) 16 *Ottawa L. Rev.* 342, at 347.

³³ *Supra* note 3, Art. 4(1)(c).

³⁴ *Supra* note 4, Art. 5(1)(c).

³⁵ My emphasis.

its Working Paper argue that the jurisdiction provision falls foul of section 11(g). Section 11(g) addresses solely the offence and not the jurisdictional basis.

The Canadian courts if faced by these arguments would, it is submitted, hold that the offence of hostage-taking is abhorrent to the community of nations. The consensus is to take steps to eradicate it. To prosecute on the basis of jurisdiction listed in Article 5(1.3) of the Criminal Code, although going beyond the 1979 Convention, would not violate the principles of fundamental justice.

Two other queries can be raised. The first is whether or not the basis of jurisdiction over the offence hinging on the presence of the offender is legitimate and second whether or not the provisions on conspiracy³⁶ that go beyond conventional international law are contestable. Both issues will be addressed in the following section, as they also relate to the Physical Protection of Nuclear Material.

Protection under International Criminal Law of Nuclear Material

Nuclear material and nuclear facilities might well present themselves as targets and in effect be used to hold governments and populations hostage until demands are met. Apart from terrorism, if physical protection is not adequate on a world-wide basis any unauthorized individuals or groups could divert nuclear materials or sabotage facilities.

The responsibility for the establishment and operation of a physical protection system is within the competence and authority of a state. However, it is still a matter of concern to other states as to whether the responsibility for protection is being lived up to. It is a question therefore of concern and co-operation,³⁷ especially when material is to be transported across international borders.

In recognizing the problems, the International Atomic Energy Agency (IAEA) realized that it had a role to play in promoting protection and international co-operation.³⁸ In 1980, the Convention on the Physical Protection of Nuclear Material was adopted in

³⁶ As hostage-taking under section 24.7(2) of the Code is an indictable offence, ss. 423(3) and (4) apply.

³⁷ See S. Eklund, Director General of the International Atomic Energy Agency, in his preface to "The Physical Protection of Nuclear Material," June 1977, INF CIRC/225/Rev. 1.

³⁸ *Ibid.*

Vienna.³⁹ It is not yet in force.⁴⁰ Canada signed the Convention on September 22, 1980, and the Criminal Law Amendment Act 1985 provides in new section 6(1.4-1.8) for implementation of domestic jurisdiction over offences involving nuclear material that are necessary to be in place so that Canada can meet the international obligations and hence ratify the Convention.

The amendment to the Criminal Code follows closely the 1980 Convention. Nuclear material is defined. Section 6(1.8) provides:

For the purposes of this section, "nuclear material" means

(a) plutonium, except plutonium with an isotopic concentration of plutonium-238 exceeding eighty per cent,

(b) uranium-233,

(c) uranium containing uranium-233 or uranium-235 or both in such an amount that the abundance ratio of the sum of those isotopes to the isotope uranium-238 is greater than 0.72 per cent,

(d) uranium with an isotopic concentration equal to that occurring in nature, and

(e) any substance containing anything described in paragraphs (a) to (d),

but does not include uranium in the form of ore or ore-residue.

The thrust of the Convention is to apply to nuclear material certain levels of protection. States parties are obliged to take appropriate steps within their national law and consistent with international law to ensure that as far as practicable such material is protected, whether it is within its territory or on board a ship or aircraft under its jurisdiction that is engaged in transport to or from that state.⁴¹ It seems to provide, among other things, for co-operation and assistance to the maximum feasible extent where theft, robbery, or other unlawful taking of nuclear material occurs, or where there is a credible threat thereof.⁴²

States agree to make the intentional commission of offences dealing with nuclear material, as provided in the Convention, punishable under their domestic laws.⁴³ Such offences are to be punishable by "appropriate penalties"⁴⁴ which take into account the grave nature

³⁹ March 3, 1980. See *supra* note 7.

⁴⁰ *Ibid.* By Art. 19 it requires 21 ratifications, acceptances, or approvals.

⁴¹ *Ibid.*, Art. 3.

⁴² *Ibid.*, Art. 5(2).

⁴³ *Ibid.*, Art. 7(1).

⁴⁴ *Ibid.*, Art. 7(2).

of the offences. Jurisdiction is to be established on the widest number of bases,⁴⁵ including the presence of the offender within the territory.⁴⁶ The Convention does not exclude any criminal jurisdiction exercised in accordance with national law.⁴⁷ Article 9 is essential in that it provides that states parties must take appropriate measures, including detention under its national laws, to ensure the presence of the offender for the purposes of prosecution or extradition. There shall be extradition or submission to the local authorities for the purposes of prosecution, "without exception whatsoever and without undue delay."⁴⁸ One unusual feature is that the states parties agree to give each other all necessary assistance with respect to criminal proceedings concerning offences under the Convention. This assistance includes supplying evidence. However, the law of the state that is the subject of the request shall apply.⁴⁹

Canada's obligations under the Convention are to be met in the 1985 Act. Section 6 of the Criminal Code of Canada as amended states:

(1.4) Notwithstanding anything in this Act or any other Act, where

(a) a person outside Canada receives, has in his possession, uses, transfers the possession of, sends or delivers to any person, transports, alters, disposes of, disperses or abandons nuclear material and thereby

(i) causes or is likely to cause the death of, or serious bodily harm to, any person, or

(ii) causes or is likely to cause serious damage to, or destruction of, property, and

(b) the act or omission described in paragraph (a) would, if committed in Canada, be an offence against this Act, that person shall be deemed to commit that act of omission in Canada if paragraph (1.7) (a), (b) or (c) applies in respect of the act or omission.

(1.5) Notwithstanding anything in this Act or any other Act, everyone who, outside Canada, commits an act or omission that if committed in Canada would constitute

(a) a conspiracy or an attempt to commit,

(b) being an accessory after the fact in relation to, or

⁴⁵ *Ibid.*, Art. 8.

⁴⁶ *Ibid.*, Art. 8(2).

⁴⁷ *Ibid.*, Art. 8(3).

⁴⁸ *Ibid.*, Art. 10.

⁴⁹ *Ibid.*, Art. 13.

(c) counselling in relation to,

an act or omission that is an offence by virtue of subsection (1.4) shall be deemed to commit the act or omission in Canada if paragraph (1.7) (a), (b) or (c) applies in respect of the act or omission.

(1.6) Notwithstanding anything in this Act or any other Act, everyone who, outside Canada, commits an act or omission that if committed in Canada would constitute an offence against, a conspiracy or an attempt to commit or being an accessory after the fact in relation to an offence against, or any counselling in relation to an offence against,

(a) section 294, 298, 303 or 338 in relation to nuclear material,

(b) section 305 in respect of a threat to commit an offence against section 294 or 303 in relation to nuclear material,

(c) section 381 in relation to a demand for nuclear material, or

(d) paragraph 243.5 (1) (a) or (b) in respect of a threat to use nuclear material

shall be deemed to commit that act or omission in Canada if paragraph (1.7) (a), (b) or (c) applies in respect of the act or omission.

(1.7) For the purposes of subsections (1.4) to (1.6), a person shall be deemed to commit an act or omission in Canada if

(a) the act or omission is committed on a ship that is registered or licensed, or for which an identification number has been issued, pursuant to any Act of Parliament,

(b) the act or omission is committed on an aircraft

(i) registered in Canada under regulations made under the *Aeronautics Act*, or

(ii) leased without crew and operated by a person who is qualified under regulations made under the *Aeronautics Act* to be registered as owner of an aircraft in Canada under such regulations; or

(c) the person who commits the act or omission is a Canadian citizen or is, after the act or omission has been committed, present in Canada.

Several questions can be raised concerning these new provisions in the Criminal Code. The Law Reform Commission argues⁵⁰ that the Code provisions, like Articles 7 and 8 of the Convention, should have taken two distinct steps. They should have created the offences in one section as set down in Article 7 and then separately laid out the bases of jurisdictions as in Article 8. The Commission views the all-in-one section approach as confusing and also is uncertain whether Canada has therefore fully implemented Article 7 of the Convention.⁵¹ The Commission working paper reads:

⁵⁰ *Supra* note 27, at 96-97.

⁵¹ *Ibid.*

an Article 7 offence committed by an alien outside Canada but *not* on board a Canadian ship or aircraft, would *not* be an offence under the proposed subsections 6(1.4), (1.5) and (1.6) of the *Criminal Code* unless the offender came to Canada after committing the offence. In other words, incongruously, unless the offender came to Canada in such a case there would be no offence and there would be no grounds for extraditing the offender to Canada.⁵²

It is suggested by this writer that the new Code provisions go as far as the Convention does. The "presence within the territory" provision in Article 8(2) is implemented by Article 6(1.7)(c). Under the Article 8(2) convention regime Canada is obliged to take measures to establish jurisdiction where the alleged offender is present in its territory and it does not extradite him. This is the *aut dedere, aut judicare* provision to ensure prosecution where a state such as Canada has the alleged offender in custody but for some reason cannot extradite to the requesting state. The Commission seems to miss the point in its comments quoted above as to it being incongruous that an alien committing an offence abroad that does not relate to Canada in any way concerning export or import of international nuclear materials could not be extradited to Canada. It would be rather incongruous if he or she could be! In the absence of the true universal principle whereby a state may seek to exercise jurisdiction over all offences whoever commits them and wherever they are committed and seek extradition on that basis, we are left with a principle that does not go so far but rather rests on the fact that if the offender enters a state party to the Convention after the commission abroad of the offence that state will have jurisdiction over the offence simply by the presence in its territory of the alleged offender. The offence will only then be cognizable in that state and the offence be deemed to have been committed within that state.

This concept of *aut dedere, aut judicare* is the crucial provision in all the multilateral anti-terrorist Conventions.⁵³ It is the provision that seeks to stop the gap that would result if the alleged offender were found in the territory of, for example, Canada, but extradition were not possible. It seeks to maximize the possibilities for prosecution by states parties to the Convention. The Hostage-Taking Convention⁵⁴ is similar in approach and is similarly implemented in section 6(1.3)(c)(g). However, unlike the Hostage-Taking Con-

⁵² *Ibid.*, 97.

⁵³ See *supra* notes 3, 4, 5, and 6.

⁵⁴ *Supra* note 6, Art. 5(2).

vention,⁵⁵ the Nuclear Protection Convention⁵⁶ does not indicate that the decision to prosecute is to be considered by the competent authorities in the state as in the case of only ordinary offence of a grave nature under the law of that state. The concerns addressed by the Law Reform Commission as to ships licensed in Canada and aircraft leased to a person abroad qualified to be registered as an owner in Canada can be voiced equally here. This writer's arguments would be the same as given above in the section on hostage-taking.⁵⁷

One last controversy that the implementing sections of the Criminal Code present are that section 6(1.5)(a) stipulates that a conspiracy entered into outside Canada to commit an act or omission concerning nuclear material as provided in section 6(1.4) will be deemed to have been committed in Canada if one of the bases of jurisdiction listed in 6(1.7) is applicable. Section 6(1.6) similarly indicates conspiracies. This section goes further than the Convention, which in Article 7 provides only for attempts and participation in the offence. It can be questioned whether this is therefore in accordance with international law. A similar analysis can be made of the hostage-taking offence contained in section 247(2) of the Criminal Code and the applicable conspiracy provisions contained in sections 423(3) and (4). The Hostage-Taking Convention does not provide for conspiracy as an offence.

The Law Reform Commission states that this approach "may go beyond the bounds of international law unless an overt act in furtherance of the conspiracy takes place in Canada." This writer would argue that even though not included in the Convention, Canada by going beyond this Convention is acting responsibly and would be in accordance with our general practice on conspiracy as set out in section 423 of the Criminal Code. That section provides that it is now an offence to conspire in Canada to commit an offence outside Canada that is an offence under the laws of that place and to conspire outside Canada to commit an offence in Canada.⁵⁸ Canada sought here to prevent itself from being a planning base for criminal activities in other states and to prevent people who may or may not be Canadian citizens from planning offences abroad for execution

⁵⁵ *Ibid.*, Art. 6(2).

⁵⁶ *Supra* note 7.

⁵⁷ *Supra*, pp. 231-37.

⁵⁸ Section 423 as am., by S.C. 1974-75-76, c. 93, s. 36.

in Canada. It is not an offence to conspire outside Canada to commit an offence outside Canada. The saving provision contained in section 423(6) to prevent double jeopardy or punishment provides that if a person has been tried and convicted or acquitted abroad, that shall be deemed a trial, conviction, or acquittal in Canada. A similar provision appears specifically in section 6(4). This is certainly in accordance with Canadian law and would not therefore violate section 11(g) or section 7 of the Charter of Rights. The question of prosecution for conspiracies to commit transnational crimes in other states has been dealt with by the Supreme Court of Canada to date without any problem.

It is unclear why the drafters of section 6(1.4), in seeking to lay down acts or omissions relating to nuclear material that occur outside Canada as offences, did not mention the sections of the Criminal Code that create the offences referred to in section 6(1.4). This was the route taken in implementing the Internationally Protected Persons Convention 1974⁵⁹ in section 6(1.2). Particular offences should have been stipulated as now having extraterritorial effect under section 6(1.4).⁶⁰ Does that section include the following: death by criminal negligence (section 203); causing bodily harm by criminal negligence (section 204); murder (section 212); mischief causing actual danger to life (section 387(2)); mischief to public property (section 387(3)); and wilful damage to property (section 388)? Section 6(1.4) must be read as incorporating these offences for it to make any sense. However, it is likely that a person accused of a nuclear material offence could successfully argue that section 6(1.4) does not create any offences. The Law Reform Commission recommends that section 6(1.4) should be amended to refer to specific sections of the Criminal Code and also to other statutes as, for example, the Atomic Energy Control Act.⁶¹ It takes the position that section 6(1.4) does not define the offences with sufficient clarity or certainty.

The last aspect of this matter is that section 6(3) of the new Code sections states that:

Where a person is alleged to have committed an act or omission that is an offence by virtue of this section, proceedings in respect of that offence may, whether or not that person is in Canada, be commenced

⁵⁹ *Supra* note 5.

⁶⁰ *Supra* note 27, at 98.

⁶¹ R.S.C. 1970, c. A-19.

in any territorial division in Canada and the accused may be tried and punished in respect of that offence in the same manner as if the offence had been committed in that territorial division.

Can it be argued that this section is inconsistent with section 6(1.3) (f) and section 6(1.7) (c)? The Law Reform Commission would seem to do so.⁶² It argued that the words "whether or not that person is in Canada" are confusing and appear to be inconsistent.⁶³ As stated earlier, section 6(1.3) (f) dealing with hostage-taking and section 6(1.7) (c) dealing with nuclear protection concern the basis of jurisdiction relating to the presence of the offender in Canada after the act or omission has been committed. This writer agrees with the Commission that section 6(3) is a trifle confusing, but it is not inconsistent. The aim of the section is to enable proceedings to commence regardless of the location of the alleged offender. This provision would allow the laying of an information or the preferring of an indictment regarding an accused who is now outside Canada, thereby facilitating extradition as it is necessary before an extradition request is made for a charge to have been laid in the requesting state.⁶⁴ Section 6(3) clearly does not allow trial and sentencing of the accused in Canada *in absentia*. That would surely be in violation of section 7 of the Charter of Rights.

CONCLUSION

In conclusion, it is a fact of life that the more states parties to all these anti-terrorist conventions, the better the chance of success. Progress will be made only when there is a complete lack of safe haven and sympathetic states. A good sign is the slow but steady progress of states acceding to the conventions, which bodes well for the future, as long as the states parties live up to their manifold obligations. Canada's implementation of the Hostage-Taking and Nuclear Material Conventions is a fine example to all other states.

The reduction of safe havens and the use of wide bases of jurisdiction over the offence, coupled with proper use of the *aut dedere, aut judicare* articles in the Conventions, should be a deterrent to possible future terrorists. Perhaps the will may be present to formulate a new convention that deals with matters not addressed in the

⁶² *Supra* note 26, at 99.

⁶³ *Ibid.*

⁶⁴ A similar amendment in the 1985 Act may be found in s. 423(5) re conspiracy to commit offences.

aforementioned conventions. Such a convention could look to the other types of offences listed in the European Convention for the Suppression of Terrorism,⁶⁵ such as offences involving the use of bombs, grenades, rockets, automatic firearms, and letter or parcel bombs. Deterrence naturally will only occur in cases where individuals concerned do care about their own safety and freedom from incarceration. In cases where the terrorist aim is publicity and individual safety is rated at zero, the deterrent factor, unfortunately, will rate low.

⁶⁵ 1977, E.T.S. No. 97.

Sommaire

Loi de 1985 modifiant le droit pénal

L'article traite des dispositions de la Loi de 1985 modifiant le droit pénal adoptée afin de mettre en oeuvre la Convention de 1979 concernant la prise d'otages et la Convention de 1980 sur la protection du matériel nucléaire. Ces deux conventions ont pour objet d'empêcher tout acte de terrorisme. Ainsi les États partis à ces deux conventions (de même que pour les Conventions sur le détournement des avions et d'autres offences contre l'aviation civile et les attentats contre les personnes internationalement protégées, y compris le personnel diplomatique) s'engagent à s'assurer qu'il existe dans leur droit interne de larges bases de juridiction sur des offences données et s'engagent à extraditer ces personnes s'ils ne se chargent pas de les poursuivre directement (aut dedere, aut judicare).